Reynolds Electric, Inc. *and* Gabriel T. Rice. Case 7–CA–44926

June 25, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On January 24, 2003, Administrative Law Judge Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

We affirm the judge's finding that the Respondent violated Section 8(a)(1) of the Act by laying off and later refusing to recall George Hebb V, but we reverse his finding that the Respondent violated Section 8(a)(1) by laying off and later refusing to recall Gabriel Rice.

In concluding that Rice's layoff was unlawful, the judge found, inter alia, that Rice had engaged in concerted activity and that the Respondent knew that he had done so. Assuming without deciding that the judge correctly found that Rice had engaged in concerted activity, we conclude that it has not been established that the Respondent knew that he had done so.

Rice had been told by employees of other subcontractors at the Schoenhals Elementary School worksite that the school project was a prevailing wage job (the Respondent was a subcontractor at Schoenhals). Rice, who performed work for the Respondent at that site (among others) had about 12 conversations on this subject with Edward M. Whitcher, who was then a supervisor for the Respondent. During these brief discussions, the first of which took place about mid-or late-September 2001, Rice told Whitcher that the other subcontractors' employees had told him that the school project was a prevailing wage job (and that they were paid accordingly) and he asked Whitcher whether this was so. Whitcher always said that the job was not a prevailing wage job. On September 19 or 20, after talking to the general contractor's superintendent, Rice told Whitcher that the superintendent had said the job was a prevailing wage job. Whitcher said he would check into the matter, but Rice never heard back from him.

The information that the job was a prevailing wage job had been secured by Rice in conversations that he had with unionized carpentry employees of subcontractors. Rice had also spoken about this matter with Respondent's employees.

The judge acknowledged that Rice was alone during his conversations with Whitcher, and that Rice did not tell Whitcher whether his inquiries were made solely on his own behalf or reflected the concerns of other employees. The judge also noted that because Whitcher did not testify, he was not asked about his understanding of the scope of Rice's inquiries. The judge therefore found it appropriate to use a "reasonable person" standard to determine whether Whitcher would have concluded that Rice represented the interests or wishes of other employees. Citing the centrality of wages among terms and conditions of employment, the fact that the other employees would have been entitled to the higher wage (if the job was a prevailing wage job), and testimony that in mid-August or September the issue was common knowledge among the employees, the judge found that Whitcher would have so concluded. He therefore found that the Respondent had at least constructive knowledge that Rice had engaged in concerted activity.

We disagree with the judge and our dissenting colleague. There is no evidence that Whitcher knew that Rice, in raising the prevailing-wage issue with Whitcher, was acting for others as well as for himself. The judge may be correct about the centrality of wages, and in his observation that all of the Respondent's employees stood to benefit if the job was indeed a prevailing wage job. Nor do we dispute the testimony that the issue was common knowledge among employees. None of this, however, establishes that the Respondent knew of Rice's conversations with Respondent's employees.

We assume arguendo that Rice's talking to the Respondent's employees was concerted activity. However, as noted, there is no evidence that the Respondent knew of this concerted activity. Thus, it has not been shown that the Respondent fired Rice in reprisal for his con-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

certed activity.[2] The inability to determine Whitcher's understanding of the scope of Rice's inquiries left an important gap in the General Counsel's case, and neither the judge nor the General Counsel has cited any authority supporting the judge's use of a reasonable person standard to find constructive knowledge in this context. In an 8(a)(1) discharge or layoff case, the issue is whether the decisionmaker knew of the concerted protected activity, not whether the decisionmaker should or reasonably could have known. Clearly, the evidence falls short of establishing that Whitcher actually knew that Rice was acting for anyone other than himself. Even accepting, solely for purposes of discussion, the idea that constructive knowledge might suffice, it is by no means clear that the knowledge attributed to Whitcher by the judge was knowledge that Whitcher, using reasonable care or diligence, should have had. In any event, the evidence is far too speculative to support a finding that the knowledge element of a prima facie case has been established here.

Our colleague emphasizes that Whitcher knew of Rice's conversations with the carpenters. This fact, however, does not render Rice's inquiries to Whitcher concerted. The judge found that Rice told Whitcher that the carpenters said that the job was a prevailing wage job, and he asked Whitcher if this was true. However, Rice's discussions with the carpenters were simply informational. They were not for the purpose of getting higher wages for those carpenters. The carpenters were already receiving union wages. Rice simply wanted to learn from them whether the job was a "prevailing wage" job. Further, even assuming arguendo that Rice's conversations with the unionized carpenters were protected concerted activity, it has not been shown that this activity was a part of the reason for laying off Rice. Our colleague says that "it stands to reason that there was a potential for an alliance between the Respondent's employees and the unionized carpenters," and that this potential was a reason to lay off Rice. There is no evidence to support these assertions. The unionized employees were employed by another employer, and there was no effort to combine the two groups into one unit (a multi-employer unit).

As to the issue of concert, our colleague further contends that Board precedent should be changed so as to eliminate the knowledge requirement in cases such as the instant one. No party has raised this issue, nor has it been briefed to the Board. In these circumstances, we decline to reconsider the extant and relevant precedent.

Nor can an adverse inference as to knowledge be drawn from Whitcher's failure to testify. The judge declined the General Counsel's request that he (the judge) draw an adverse inference from the Respondent's failure to call Whitcher (who, by the time of the hearing, was no longer employed by the Respondent), and there are no exceptions to the judge's declining to do so. We recognize that if Whitcher believed that Rice had engaged in concerted activity, and had acted on that belief, a violation could be established. However, the evidence does not establish that Whitcher entertained such a belief or acted upon same.

Finally, our colleague makes much of the judge's finding that the Respondent resorted to a pretext to conceal the fact that it discharged Rice for complaining about the wage issue. We accept arguendo that finding. However, the issue is whether Rice's complaint was concerted activity. The evidence does not establish that it was.

Accordingly, we dismiss the complaint insofar as it concerns Rice.

ORDER

The National Labor Relations Board orders that the Respondent, Reynolds Electric, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) From laying off, failing to recall, or otherwise discriminating against any employee for inquiring of a Government agency, general contractor, or the Respondent, whether work being performed by its employees should be paid at the prevailing wage rate, or for otherwise engaging in protected concerted activity.

(b) From, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer George Hebb V full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make George Hebb V whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, so-

[2] To the extent that the judge found concert in Rice's meeting with Whitcher, the judge clearly erred. A one-on-one conversation between an employee and an employer is not, without more, concerted activity. See *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded 755 F.2d 941 (D.C. Cir 1985), cert. denied 474 U.S. 948 (1985), and 474 U.S. 971(1985); reaffd. on remand 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

cial security payments records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Warren, Michigan, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 31, 2001.

Dated, Washington, D.C. June 25, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

Under current Board law, this case turns on whether Gabriel Rice's employer knew, when it laid Rice off, that his individual efforts to secure the state-required prevailing wage were an outgrowth of concerted activity involving other employees. The record establishes that:

> (1) Rice learned of the prevailing-wage requirement through discussions with unionized carpenters employed by other subcontractors on his construction job;
>
> (2) Rice had many conversations with his own coworkers about the prevailing-wage issue;
>
> (3) Rice's employer knew of his discussions with the unionized carpenters;
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> (4) Rice was laid off in retaliation for repeatedly raising the prevailing-wage issue with his employer; and
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> (5) the employer, after openly disparaging Rice, went on to lay off an employee (George Hebb) who followed Rice's lead in pressing the prevailing-wage issue.

Nevertheless, the majority finds that Rice's layoff was not unlawful, because the Respondent employer was not aware of the concerted nature of his activities.[1]

In my view, the record supports a different factual conclusion. But even if it did not, this case illustrates why the knowledge requirement makes no sense, given the Act's goal of shielding employees who, like Rice, engage in concerted activity for their mutual aid or protection. Regardless of what the Respondent knew, laying off Rice interfered with his exercise of Section 7 rights and had a reasonable tendency to chill similar activity by his fellow employees. No more should be required to find a violation of Section 8(a)(1).

I.

The facts here are straightforward: While employed by the Respondent on the Schoenhals Elementary School construction project, Rice was told by the unionized employees of other subcontractors that the project was a prevailing wage job. Rice had numerous conversations with coworkers about the prevailing wage matter, and also brought up the subject in approximately 12 conversations with one of the Respondent's supervisors, Edward Whitcher. According to Rice's credited testimony, Rice informed Whitcher that he had spoken to some of the carpenters on the jobsite and they told him it was a prevailing wage job. Rice also testified that the carpenters told him that he should talk to the superintendent about the issue. There is no evidence that Rice informed Whitcher that he was speaking on behalf of any other employee in raising the prevailing wage issue or that the carpenters had urged him to take the question to the superintendent.

The Respondent claimed that it laid off Rice for lack of work. That was untrue, as the judge correctly found—a finding my colleagues do not question. When employee Hebb later pursued the prevailing-wage issue, he was also laid off on the same pretext. According to testimony credited by the judge, the Respondent repeatedly disparaged Rice and his efforts on the prevailing-wage issue. Supervisor Whitcher, for example, told Hebb, "He's trying to get you guys to go against us." The Re-

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree with the majority that the Respondent's layoff and refusal to recall Hebb violated Sec. 8(a)(1) of the Act.

spondent's owner, Russell Reynolds, told Hebb to stay away from Rice.

II.

Ensuring that all workers on the same construction project receive prevailing wages as required by law surely amounts to mutual aid or protection. See, e.g., *Walter Brucker & Co.*, 273 NLRB 1306 fn. 6 (1984). There can be no doubt that Rice's discussions with his coworkers about the prevailing-wage issue were protected concerted activity, not least because Rice's efforts ultimately led coworkers such as Hebb to pursue the issue themselves.

Moreover, it seems clear to me that Rice's discussions with the unionized *carpenters* about the prevailing-wage issue—discussions Supervisor Whitcher knew about—amounted to concerted activity, even though the carpenters were not employees of the Respondent. It is well established that Section 7 protects the efforts of workers employed by different employers, when they act together for mutual aid or protection. E.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (1978). At a minimum, then, the General Counsel satisfied the requirement of proving employer knowledge of the concerted nature of Rice's activity by establishing that Whitcher knew of Rice's conversations with the carpenters.

The majority describes the discussions between Rice and the carpenters as "simply informational." But both Rice and the carpenters had a common interest in seeing that the prevailing wage requirements were met on their project. That the carpenters "were already receiving union wages," as the majority observes, does not change this fact. It stands to reason, in turn, that the potential for an alliance between the Respondent's employees and the unionized carpenters, as well as Rice's claim for the prevailing wage, factored into the Respondent's decision to fire him.

III.

In any case, even if Whitcher was aware of neither Rice's discussions with the carpenters, nor his conversations with coworkers, Section 7 rights are implicated here, contrary to the Board's established precedent.

A brief review of current law is in order. In *Meyers Industries I*[2]—which defined concerted activity to exclude an individual employee's invocation of a statutory right—the Board also created an employer-knowledge requirement in its test for finding a violation, observing:

> Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, *the employer knew of the concerted nature of the activity*, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

Id. at 497 (emphasis added; footnote omitted). As here, the Board has subsequently applied the knowledge-requirement to find that the General Counsel has failed to establish a violation. See, e.g., *Walter Brucker & Co.*, supra, 273 NLRB at 1307.[3] Compare *Triangle Electric Co.*, 335 NLRB 1037, 1038–1039 (2001) (finding that employer had knowledge of concerted nature of employee's activity), enf. denied 78 Fed. Appx. 469 (6th Cir. 2003).

In a later case involving an employer's refusal to rehire an employee in the mistaken belief that he had filed a complaint with the Occupational Safety and Health Administration, the Second Circuit affirmed the Board's *Meyers* approach, but nevertheless expressed skepticism, observing that:

> [T]he Board's analysis placed undue emphasis on the employer's view of the situation, focusing on whether [the employer] thought [the employee's] alleged act was linked to the actions of other employees. *The key element in a chilling effect analysis should be the impact on the employees.*
>
> . . . .
>
> [T]he chilling effect, in a case such as this one, is often detected slowly over time.... The Board's current view may, with the passage of time be shown to have unintended, and even unreasonable, results.

Ewing v. NLRB, 861 F.2d 353, 362 (2d Cir. 1988) (emphasis added).

IV.

The Second Circuit's prescience is amply demonstrated in this case. Why should Rice, who engaged in protected, concerted activities, be denied the protection of the Act, simply because his employer was unaware of the concerted nature of those activities? Rice was laid off in derogation of his statutory rights; he was no less coerced in the exercise of those rights merely because the Respondent may not have been aware that he was exercising them when it retaliated against him.[4] And the Re-

[2] 268 NLRB 493 (1984) (*Meyers I*), remanded 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and 474 U.S. 971 (1985); reaffd. on remand 281 NLRB 882 (1986) (*Meyers II*), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

[3] Member Zimmerman dissented in *Walter Brucker*, supra, as he had in *Meyers Industries I*, supra, taking the position that when an individual employee asserts a statutory right, his activity should be rebuttably presumed to be concerted—as, in fact, it was in that case (and here).

[4] There is no basis to think that had the Respondent been aware of Rice's conversations with coworkers, it would have acted any differ-

spondent's actions would certainly tend to chill similar activities on the part of other employees, even if the Respondent believed that Rice's activities were not concerted. (Indeed, the Respondent did its best to intimidate employee Hebb by warning him away from Rice, after both were laid off for pursuing the prevailing-wage issue.)

It is no answer to say that the employer's knowledge is essential to a finding of unlawful motive and that such a motive is required to find a violation of Section 8(a)(1). Where adverse action against an employee will necessarily chill Section 7 rights, the Act has been violated—even if the employer has acted in good faith.[5] That is the principle endorsed by the Supreme Court in holding employers liable under Section 8(a)(1) when they take action against employees on the mistaken belief that they engaged in misconduct during the course of otherwise protected activity. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964). As the Court explained,

> [T]he example of employees who are discharged on false charges would or might have a deterrent effect on other employees. . . . A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the Section 8(a)(1) right that is controlling.

Id. at 23–24.

Here, then, it should be enough the Respondent laid off Rice for activity that, on its face, implicated the interests of other employees and that, in fact, was the outgrowth of his concerted activity. Accordingly, I dissent.

Dated, Washington, D.C. June 25, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay you off, fail to recall you, or otherwise discriminate against you because you inquire of a Government agency, a general contractor, or us about whether you and other employees on a job should be receiving pay at the prevailing wage rate.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer George Hebb V full reinstatement to his former job or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make George Hebb V whole for any loss of pay or other benefits suffered as a result of our unfair labor practices.

REYNOLDS ELECTRIC, INC.

Linda Rabin Hammell and *Rana S. Roumayah, Esqs.*, for the General Counsel.
Thomas Williams, Esq., of Detroit, Michigan, for the Respondent.
Gabriel T. Rice, Pro Se.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. Based on a charge filed by Gabriel T. Rice on March 15, 2002, a complaint and notice of hearing was issued in this matter on June 24, 2002. The General Counsel alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by laying off Gabriel T. Rice and George V. Hebb V on October 23 and 31, 2001,[1] respectively, and failing to recall them, because they engaged in protected concerted activities. The Respondent, by its answer, denied the commission of any unfair labor practices.

Pursuant to notice, a trial was held before me in Detroit, Michigan, on October 8, 2002, at which the General Counsel and the Respondent were represented by counsel. All parties were afforded full opportunity to be heard, to examine and

ently, out of respect for Rice's rights under the Act. The Respondent laid employee Hebb off for making similar inquiries, even though it knew perfectly well that his actions, following Rice's lead, were concerted.

[5] The Respondent, of course, did not act innocently: Rice's only perceived "misconduct" was invoking employees' statutory right to the prevailing wage.

[1] All dates are in 2001 unless otherwise indicated.

cross-examine witnesses, and to introduce evidence. The General Counsel and the Respondent filed posthearing briefs, which I have duly considered.

On the entire record in this case, including my observations of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a Michigan corporation with an office and place of business in Warren, Michigan, where it is engaged in the electrical contracting business. During the calendar year ending December 31, 2001, the Respondent, in conducting its business operations, provided services valued in excess of $50,000 to the United States Government. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The witnesses for the General Counsel were Rice and Hebb, and former employee Kelly Barnard. The witnesses for the Respondent were its president and owner, Russell T. Reynolds Jr. and employee Nicholas Schaefer.

Former Supervisor Edward M. Whitcher, who was admitted to be a supervisor within the meaning of Section 2(11) of the Act and an agent of the Respondent under Section 2(13) of the Act, was not called by the Respondent. The General Counsel, in its posthearing brief (at p. 9 fn. 8), asks that an adverse inference be drawn from the Respondent's failure to produce Whitcher, arguing that Reynolds testified that Whitcher's parting from the Respondent was amicable and that Whitcher's presumptive favor toward the Respondent was not challenged.

More precisely, Reynolds testified that Whitcher's departure was a result of "a mutual agreement between [us]" (Tr. 170). It is well established that drawing an adverse inference from a Respondent's failure to call a former supervisor is inappropriate in the absence of a showing that it would be reasonable to assume that he or she is favorably disposed toward the Respondent. *Reno Hilton*, 326 NLRB 1421 fn. 1 (1998); *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998); *Goldsmith Motors Corp.*, 310 NLRB 1279 fn. 1 (1993); *Property Resources Corp.*, 285 NLRB 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988). This would seem to be based on the logical premise that, depending on the circumstances of his or her separation, the former supervisor might be hostile to the respondent rather than favorable. The evidentiary burden clearly rests on the party requesting that an adverse inference be drawn.

Reynolds' statement about Whitcher's separation was conclusionary and vague and falls short of showing that it would be reasonable to assume that Whitcher is favorably disposed, rather than antagonistic, toward the Respondent. Accordingly, I decline to draw an adverse inference from the Respondent's failure to call him. Regardless, statements attributed to him by Rice and Hebb went unrebutted.

The Respondent performs mostly commercial and industrial type work, with some residential jobs. Some of its contracts with governmental entities have been on prevailing wage rate jobs, and on those, the Respondent has paid a higher wage ($18.50 an hour, at all times material). It has always been a nonunion company.

On June 19, the Respondent entered into a purchase order contract in the amount of $134,000 with general contractor, Bernco, Inc., providing that the Respondent, as a subcontractor, perform work at the Schoenhals Elementary School (the school).[2] Reynolds testified that not all public school contracts are prevailing wage jobs. The parties stipulated that there was nothing in the job specifications referencing prevailing wage, nor was there anything in the contract concerning the matter. Reynolds testified that he did not know at the time of the contract that the school job was, in fact, a prevailing wage job, and I will credit his testimony on this point.

It was stipulated that the personnel records of Rice and Hebb, provided by the Respondent pursuant to subpoena, do not contain any documents constituting performance evaluations, disciplinary notices, or warnings, with the exception of one note in Hebb's file dated October 4, 2001.[3] This note, handwritten by Whitcher, apparently resulted from a conversation initiated by Hebb and states that Whitcher explained that he (Hebb) was doing good but needed to listen to the job runner and work together. On its face, it does not rise to the level of a disciplinary notice or warning.[4] In any event, Reynolds testified that Hebb was a "pretty good" employee (Tr. 156) and that the sole reason that Hebb and Rice were laid off was a slowdown in work. It was further stipulated that the personnel files of Hebb and Rice do not contain separation notices such as the one in Dennis White's personnel file, in which the "Lack of work" box is checked as the reason for separation.[5]

When Rice and Hebb were hired as apprentice electricians in August and on June 15, respectively, there were six other apprentices and three journeymen electricians. Whitcher verbally assigned work each morning, and the men worked with different crews. They were frequently taken off jobs before completion, to work on other jobs. Both started working at the school the first week they were hired, and they continued to work there off and on until the dates that they were laid off. Rice and Dennis White worked at the school the most consistently, but all employees worked there at one time or another. Hebb performed about 200 hours of work at the school. Neither Rice nor Hebb were ever told that they were hired for only one job. Rice's normal pay was $14 an hour; Hebb was hired at $15 an hour but requested and received a pay raise to $16 an hour, after approximately 1–1/2 months. They both were paid $18.50 an hour for work they performed at the U.S. Tank Plant, which the Respondent knew to be a prevailing wage job.

Rice engaged in all aspects of electrical work, including blueprint reading, layout work, general pipe runs, and installing wires and electrical devices. In addition to working at the school and at the U.S. Tank Plant, Rice and Hebb worked on other jobs for the Respondent. Thus, Rice worked at a car deal-

[2] R. Exh. 7.

[3] GC Exh. 5.

[4] Contrast, GC Exh. 7, an "Employee Warning Notice" issued to an employee on January 4, 2002, and signed by both the supervisor and the employee.

[5] GC Exh. 6.

ership, DeCal, Dot's Concepts, and a couple of residential jobs; and Hebb worked at PGAM, Roy O'Brien Ford, a factory, and other public schools.

Workers of other subcontractors to Bemco were at the school, and they told Rice and other employees of the Respondent that they were unionized and that the job was a prevailing wage job. Prior to his layoff, Rice had many conversations about this with coworkers, primarily Hebb but in passing with Barnard and Dennis White, and also with Bernco Superintendent Don (last name unknown) and Supervisor Whitcher. Schaeffer, who has been employed by the Respondent as an electrical apprentice since October 1999, testified that carpenters working at the school job talked about it being a prevailing wage job starting in late August or early September, and that it was common knowledge among the Respondent's employees.

Rice had approximately 12 conversations with Whitcher on the subject, the first in around mid-or late September. These took place after the completion of the day's work, most at the jobsite, some at the Respondent's shop in Warren. Rice initiated these brief (at most 5-minute) conversations and normally would tell Whitcher that the carpenters on the school jobsite were telling him that it was a prevailing wage job. Rice would ask Whitcher if it was a prevailing wage job, to which the latter replied no. Rice related Whitcher's response to the carpenters and Don. On September 19 or 20, after speaking with Don, Rice told Whitcher that Don stated that it was a prevailing wage job. Whitcher replied that he would check into it, but Rice never heard back from him.

Rice was paid $14 an hour for work at the school. During the week of September 3–7, he received $14 an hour for the 8 hours he worked at the school, and $18.50 an hour for the 20 hours he worked at the DeCal job.[6] However, the following week, his pay went back to $14 an hour for all of his hours. When he asked Whitcher about this, Whitcher responded that his being paid $18.50 an hour the previous week was the result of a clerical error. Rice was never asked to pay back the overpayment, and it was never deducted from his subsequent paychecks.

There apparently was some confusion in Rice's mind as to what work the $18.50 an hour related to, since he told other employees at the time that he was paid prevailing wage for work at the school job. In the absence of other evidence that the Respondent was deliberately seeking to provide Rice with a benefit to secure his silence, I decline to find any improper motive in his extra payment for DeCal work and will not use such as a factor in determining the lawfulness or unlawfulness of the layoffs in issue. On the other hand, I do not find that Rice's error was intentional or that he was purposefully trying to misstate the facts on this matter during his testimony.

Rice was laid off on October 23. He was working on the school that day, when he and White were asked to return early to the shop. Whitcher saw White first in his office. When Rice went in, Whitcher said he had laid off White for lack of work and was laying off Rice for the same reason. He told Rice that the Respondent was pulling out of the school job and that Rice would be hired back if the school job resumed or if there was other work. Rice stated that there were employees with less seniority than him (at least one employee, by the name of Matt, had less seniority than Rice or Hebb but was not laid off when they were). Whitcher did not respond.

Rice testified that he also was working at DeCal the week he was laid off. Further, at the time, the company was performing jobs at other locations, such as the car dealership, tank plant in Warren, McNamara Federal Building, other public schools, and a factory. Rice had worked at the car dealership and the tank plant. He had also worked approximately 32 hours of overtime on Saturdays at the school, from August through October. Other employees, including Hebb, White, Barnard, and Schaeffer also worked overtime on Saturdays at the school. At the time of Rice's layoff, there was at least 1 or 2 months left on the school project, and at the end of November, he and Hebb drove by the school and observed that electrical work was still being performed. Rice was never recalled.

In November, Rice filed a prevailing wage rate claim with the applicable State agency, which subsequently determined that the school job was, in fact, a prevailing wage rate job, and informally resolved the matter with the Respondent.[7]

Rice was a credible witness. He answered questions directly and readily and did not appear to make any efforts to embellish or exaggerate.

Hebb testified that after Rice advised him that the carpenters had said the school was a prevailing wage job, he had a conversation with Whitcher in late July or early August.[8] Hebb asked if the school was a prevailing wage job, and Whitcher said no.

After Rice's layoff, Hebb and Schaeffer were assigned to the school job. Hebb testified that at the time Rice was laid off, there was a good 2 to 2–1/2 months of work remaining there. A few days or so after Rice and White were laid off, Hebb suggested to fellow employees Schaeffer and Dave Slone that they speak to Whitcher on the subject of prevailing wage. They went to Whitcher's office, where all three employees spoke. They stated that they had heard from Bernco Superintendent Don that the school job was a prevailing wage job and that Rice had been paid prevailing wage. Hebb asked to see Rice's pay stubs. Whitcher slammed down some papers and denied that Rice was paid the prevailing wage rate. Whitcher said he would go out to the jobsite and ask Don, and they all could have a meeting the next morning. Whitcher called Rice a liar and "pretty much bad-mouthed" him (Tr. 59).

When I asked Hebb to be as specific as possible in relating what Whitcher said about Rice, Hebb testified: "Well, he [Whitcher] said he [Rice] was a piece of s—. . . . [H]e wasn't

[6] See GC Exhs. 12 and 13.

[7] See GC Exh. 4, letter dated June 27, 2002, to Hebb from the Michigan Department of Consumer & Industry Services, Wage and Hour Division.

[8] The date is potentially inconsistent with Rice's testimony that he first spoke to Whitcher in mid-or late September, but such a discrepancy in dates is not unusual, particularly when neither man knew at the time of the conversations that they would later be of evidentiary importance. In any event, the discrepancy is not material to the issues in this case.

any good. And he's telling you guys lies. He's trying to get you guys to go against us" (ibid).[9]

The following day, Whitcher came to the jobsite and went into Don's office for about 20 minutes. Afterward, he came back and told Hebb and Schaeffer that they could have a meeting with Don, but it was not a prevailing wage job. They replied okay, that they believed him. Schaeffer and Hebb then went to Don's office, where Don explained, "I put my foot in my mouth" (Tr. 63) and said it was not a prevailing wage job.

The next day, October 31, bricklayers told Hebb that there was a man from the State of Michigan onsite, checking to see if the workers were being paid prevailing wage. Hebb went over to the State Representative, Don Mustonen. He told Mustonen his trade. Mustonen asked if he was getting paid $26 an hour, to which Hebb responded no. Mustonen confirmed telephonically that it was a prevailing wage job. He gave Hebb paperwork and told him to take it to the CIS (Consumer & Industry Services). During this conversation, Don was standing about 20 feet away, and he and Hebb had eye contact.

After the conversation, Schaeffer received a phone call from Whitcher. Schaeffer's version of what was said therein and what happened afterward was inconsistent with Hebb's. According to Hebb, Schaeffer stated that the Respondent knew the "guy from the]S]tate" (Tr. 67) was out there and for them to come back to the shop immediately. According to Hebb, they were never before ordered off the site like that. Schaeffer testified, on the contrary, that Whitcher told him there was nothing else for him and Hebb to do on the job because the bricklayers were still building walls. He further testified that having to leave early was a frequent occurrence. Schaeffer testified that they went to the shop before going home but that he was not privy to any conversation between Whitcher and Hebb that day.

According to Hebb, both he and Schaeffer went back to the shop and met with Whitcher and Reynolds. Hebb showed Reynolds the CIS paperwork. He asked Reynolds why they had been summoned to the office in the middle of the day. Reynolds replied that he had to pull them off the site because he did not want to look guilty. He further stated that he knew that somebody had called the State on him. Reynolds further stated that he was going to sue Bernco because they did not tell him it was a prevailing wage job and he was going to have a lawsuit against them. Reynolds also said that he knew that Rice had called the State on him, and that "he [Reynolds] was going to beat the s—out of him, if he was here, he'd kick his ass, and, hopefully, [Rice had] a lot of money because he's going to have a lawsuit against him" (Tr. 70). Schaeffer stated that he would work for Reynolds and do whatever he said. Reynolds asked Schaeffer to accompany him to his office. Afterward, Reynolds returned and told Hebb that he was being laid off until everything got cleared up with the job. He stated he would call Hebb at the end of the day and get him back to work.

Reynolds called Hebb that afternoon. Reynolds told Hebb that he (Reynolds) knew that Hebb had called the State on him and that he could not have people like Hebb working for him. Hebb testified that Reynolds accused him of "trying to mess with me" (Tr. 73) and said he would not get a dime out of him. Reynolds kept saying that he was going to get Rice, that Rice needed to watch out, and that Hebb should stay away from Rice. The conversation was heated, and Hebb hung up on him.

Hebb was never recalled. At the time of his layoff, there was about 1–1/2 months of work left on the school job. The Respondent's other jobs at the time included O'Brien Ford, other public schools, the McNamara Federal Building, the U.S. Tank Company (two or three separate projects), and PCAM. Hebb had worked on all of these jobs.

Following his layoff, Hebb called Reynolds on three occasions, asking for timecards in connection with his State wage claim. The first occurred about 1 month after Hebb's layoff. Reynolds told him that he was going to fight him all the away and said he hoped Hebb had a good lawyer. In the second conversation, about a month thereafter, Reynolds stated that he would not provide the information and repeated that he would fight him.

The last of the conversations occurred in approximately late February 2002. Reynolds began by saying that he wanted to work things out and for Hebb to stay away from Rice, because Reynolds was going to sue him. Hebb responded that that was between him and Rice. Hebb asked for his timecards, and Reynolds replied no. Hebb testified that the conversation "ended pretty bad" (Tr. 78), with Reynolds saying, . . . like you're a piece of s—, you're lazy, you're a dime a dozen in my book, and just started saying all kinds of stuff to me, and I was pissed off then and I said, you know, f—you, you know, and he said f—you, you a—, and started just going off on me, and I said, well, the conversation's taped. And that's when he hung up on me" (ibid).

I credit Hebb's version of the conversation over Reynolds, who denied having any telephone conversations with Hebb in which profanity was used. In addition to my general credibility findings, I observed during the hearing that both Hebb and Reynolds exhibited marked irritation and impatience during cross-examination. Both struck me as being easily provoked and somewhat volatile. I agree with Respondent's counsel's statement on page 14 of his brief that much of this case hinges on whether Hebb or Reynolds was the more believable witness; however, I disagree with his conclusion that Reynolds was the more credible.

Although Hebb was prone to rambling and getting off track during his testimony—he had to be reminded to focus his answers—I believe he was candid and credible. For numerous reasons, I cannot say the same for Reynolds. Whitcher was not called to testify. Schaeffer, called as a witness by the Respondent, was partially credible. However, as a current employee who has been retained when others were laid off and not recalled, he would have reason not to be fully forthcoming about the events of October 31. Therefore, I credit Hebb's unrebutted testimony as to his conversations with Whitcher, as well as his

[9] Schaeffer, who is still employed by the Respondent, was called as Respondent's witness. On cross-examination, he testified that he was present at such a meeting, in which there was discussion of the status of the school job in terms of prevailing wage, and of Rice. Significantly, the Respondent's counsel did not elicit from Schaeffer any details of what was said in this meeting. As noted earlier, Whitcher was not called to testify. Accordingly, Hebb's testimony regarding the conversation, including statements Whitcher made about Rice, is unrebutted.

testimony where it conflicted with that of Schaeffer and Reynolds.

Kelly Barnard, an electrical apprentice, was also laid off on October 31 and has not been recalled. He testified that Reynolds told him at the time of his layoff that things were not going right at the school job and that he was stopping it. Reynolds also stated that he had to lay off Hebb. Once things picked up, Reynolds said, he would rehire employees but, "I'm not going to bring people back that act the way [Hebb] did this morning" (Tr. 114). The day after his layoff, Barnard observed Schaeffer and Slone working at the school site. Prior to his layoff, he had not observed any slowdown in work at the school. Barnard recalled a conversation in which Whitcher stated that work was getting slow, and they would have to lay people off, but this occurred after Rice and Hebb had already been laid off. Barnard appeared to be candid and to testify truthfully, he is not named in the complaint as a discriminatee and does not stand to benefit financially from the outcome of this case, and his testimony was consistent with the credited testimony of other witnesses. I therefore find him a credible witness.

Schaeffer testified that although he was taken off the school job on October 31, after about 3 weeks, he and Slone returned back to work there for a period of approximately a month. There was never a point when the Respondent had no work.

Reynolds testified in detail. His testimony was rife with contradictions and inconsistencies, he professed ignorance of his employment practices when his knowledge of such would be reasonably expected of the owner of a small business, his testimony was impeached by statements in his affidavit to the NLRB or by documents the Respondent submitted pursuant to subpoena, and he was frequently evasive and/or nonresponsive. For all of these reasons, I do not find him to have been credible. He testified as follows.

Since 1988, the maximum number of employees employed by the Respondent has been 15 or 16. There were between 12 and 13 in July. There are currently nine employees, including Reynolds and the secretary. Whitcher left the Company, and Reynolds is now in charge of supervision. Reynolds testified on direct examination that he has not replaced Rice or Hebb. However, on cross-examination, when asked the same question, Reynolds answered, "That could be true" (Tr. 174). Upon being shown General Counsel's Exhibit 3, a list of employees furnished by the Respondent pursuant to subpoena, he admitted that it reflects that five employees were hired after the October layoffs, all between January and August 2002.

Reynolds testified that the first time he had notice that the school job was a prevailing wage project was the Friday following Hebb's layoff on October 31, when Hebb came to get his paycheck and brought a pamphlet. According to Reynolds, Hebb said he was trying to work it out with Whitcher, and Reynolds stated he would try to get to the bottom of it. Thereafter, Reynolds spoke with Whitcher, who said he had heard it both ways. Reynolds then contacted Bernco.

I find this testimony incredulous. I credit Rice's unrebutted testimony that he had numerous conversations with Supervisor Whitcher on the subject going back to at least mid-or late September and Hebb's unrebutted testimony that Whitcher displayed animus against Rice for raising the issue prior to Hebb's layoff. Significantly, the Respondent's own witness, Schaeffer, testified that it was common knowledge among the employees as early as mid-August or September that other employees at the school were receiving prevailing wage pay. I cannot believe that Reynolds did not have awareness of the issue far earlier than he alleged, certainly prior to the date that Rice was laid off. I have to conclude, therefore, that, on notice that he might be underpaying his employees, he chose to pay a lesser wage rather than take the simple steps necessary to determine whether or not he was paying them what they were entitled to.

Reynolds' testimony concerning when the decisions were made to lay off employees was hopelessly inconsistent and confusing to the point where it was a muddle. He first testified that when he returned from his honeymoon, in approximately late September, Whitcher told him that "the bottom had, basically, fallen out" in their business (Tr. 158). He proceeded to testify that at that time (late September), Reynolds said they had to make a decision, and they selected White and Rice to be laid off.

However, Reynolds soon after testified that they made the decision to lay off White and Rice during the same week that they were laid off (the week of October 23). Later, on cross-examination, he testified that the decisions to lay off Rice and Hebb were not made "until the days that they were laid off" (Tr. 188). On cross-examination, he testified at one point that the decision to lay off two employees on October 23 was made earlier that week, but he testified at another point that the decision to lay off two people on October 23 was made "about an hour or two before they were laid off" (Tr. 191).

As to who made the decision to lay off selected employees, Reynolds was evasive. On cross-examination, when asked whether he participated with Whitcher in selecting people to lay off, Reynolds answered, "I can't say I had the final decision on that" (Tr. 183). The General Counsel then produced Reynolds' affidavit to a Board agent, given with counsel present. Reynolds confirmed that he stated therein that he and Whitcher together made the decisions to lay off Rice and Hebb.

Reynolds testified that seniority was not used as a factor in determining layoffs; rather, it was solely a matter of management discretion. I specifically asked Reynolds what factors he used in selecting the four employees laid off on October 23 and 31, as opposed to the five or six who were retained. Reynolds gave a nonresponsive answer, talking about the school project being a problem. Reynolds, on cross-examination, confirmed that in his affidavit to the Board agent, he stated, "There was no particular reason why we picked Rice" (Tr. 184). Thus, I find that the Respondent has utterly failed to articulate any reasons why Hebb and Rice were selected for layoff.

On cross-examination, Reynolds was asked if there was a policy of offering employees as much notice as possible of layoffs. He replied, "I'm not really aware of that" (Tr. 188). The General Counsel then pointed out that policy 208 of the Respondent's handbook[10] provides, in paragraph 3, "Employees selected for layoff will be given as much notice as is required by law or as much as is reasonable under the circum-

[10] GC Exh. 2.

stances." He then admitted that Rice and Hebb were given no advance notice of their layoffs but offered the explanation that they were not selected for layoff until the days that they were actually laid off.

There were four men who worked on the school job prior to the October 23 and 31 layoffs (Hebb, Rice, Slone, and White). At any one time, the maximum was four. After the layoffs, there was usually one, at most two. About 300 to 350 or more hours of work was done on the school job after October 23. Work there was completed a couple of weeks prior to the hearing, with a final inspection pending.

When asked on cross-examination whether Rice or Hebb were hired just for one job, Reynolds first replied, "Well, that I don't know for a fact . . . but it's very possible" (Tr. 180). He soon stated that when they got the school job, they needed men, and, "So I'm going to say yes, they were for that job" (Tr. 181). The General Counsel then impeached Reynolds' testimony by quoting from the affidavit Reynolds gave to the Board agent: "None of the four men [who were laid off on October 23 or 31] were hired to work on only one particular job" (Tr. 182).

Although Reynolds testified that he never had any objection to paying a prevailing wage rate, the General Counsel on cross-examination showed him March 4, 2002 letters from the Respondent's law firm to Rice and Hebb,[11] stating, inter alia, that their contention that they were owed additional pay was misplaced and that the school job was not a prevailing wage job, and threatening them with legal action. Reynolds professed ignorance of the contents of the letters written on his behalf by counsel, testimony I find to constitute yet another reason why he was unreliable as a witness. I must assume, in the absence of any reason to conclude otherwise, that the Respondent's counsel accurately reflected Reynolds' position as client and principal.

DISCUSSION AND CONCLUSIONS

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. Concomitantly, an employer may not, without violating Section 8(a)(1) of the Act, discharge or otherwise threaten, restrain, or coerce employees because they engage in such activities. *Senior Citizens Coordinating Council of Co-op City*, 330 NLRB 1100 (2000).

The discharge of an employee will violate Section 8(a)(1) if the employee was engaged in concerted activity (i.e., activity engaged in with or on the authority of other employees and not solely on his or her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. In re *Triangle Electric Co.*, 335 NLRB 1037 (2001), citing *Meyer Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*);[12] see also *KNTV, Inc.*, 319 NLRB 447, 459 (1995).

The first issue, therefore, is whether Rice and Hebb engaged in "concerted activity." Rice testified that he spoke with various other employees about the matter of prevailing wage rate. Hebb testified that he initiated a conversation on the subject between him, Schaeffer, Slone, and Supervisor Whitcher and, indeed, Schaeffer confirmed that such a conversation did occur. It is evident, therefore, that Hebb engaged in activity with other employees, thereby satisfying the necessary element that the activity was "concerted."

The fact that Rice was unaccompanied at all times that he raised with Whitcher the issue of prevailing wage does not preclude a finding that his actions were concerted. The Supreme Court has held that the acts of a single employee can be found to come within the ambit of protected concerted activities covered by Section 7 of the Act. *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (1984). As the Court stated (at p. 831):

> Although one could interpret the phrase, 'to engage in concerted activities,' to refer to a situation in which two or more employees are working together at the same time and the same place toward a common goal, the language of § 7 does not confine itself to such a narrow meaning. In fact, § 7 itself defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities (footnote omitted).

See also *Mainline Contracting Corp.*, 334 NLRB 922 (2001).

Meyers requires, nevertheless, a showing that the individual's actions, although taken alone, were preceded by the individual's interaction with other employees sharing a commonality of interest. As the Second Circuit Court of Appeals stated in *Ewing v. NLRB*, 861 F.2d 353, 361 (1986):

> The *Meyers* rule prevents personal gripes relating to job conditions and the purely individual invocation of statutory workplace rights from coming within section 7's definition of 'concerted activit[y.]" But it may well be another matter when to the employees on the jobsite, the subject of the complaint itself has been a topic of group concern that can be proven at an administrative hearing.

In the instant case, the prevailing wage rate was a benefit that would have applied to all of the Respondent's employees on the job, not just Rice alone. Obviously, all of the employees had a strong interest in finding out whether they were entitled under the law to higher wages. Rice did discuss the matter with other employees prior to at least some of his conversations with Whitcher, and Schaeffer testified that it was common knowledge among the employees in mid-August or September that there was an issue of whether they were being properly paid. I find, therefore, that Rice's actions, although done individually, were taken on behalf of the employees as a group.

Rice's lack of express authorization from other employees to contact management does not change this conclusion. The Board has recognized that an employee's individual conduct may be deemed concerted in nature by virtue of the employee being implicitly authorized to take action on behalf of other employees, once there has been established the existence of a common complaint or concern which transcends the interests of that employee alone. *Every Woman's Place, Inc.*, 282 NLRB

[11] GC Exh. 11.

[12] Remanded 755 F.2d 941 (D.C. Cir. 1988), cert. denied 474 U.S. 948 (1985), and 474 U.S. 971 (1985); on remand (*Meyers II*), 281 NLRB 882 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987); cert. denied 487 U.S. 1205 (1988).

413 (1986). The Sixth Circuit Court of Appeals has also adopted the principal that it is not necessary for an employee to be appointed or formally chosen by fellow employees to represent them, in order to be found to have engaged in concerted activity on their behalf. See *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 539 (6th Cir. 2000); *NLRB v. Talsol Corp.*, 155 F.3d 785, 796 (6th Cir. 1998). Here, the fact that Schaeffer and Slone later accompanied Hebb to inquire of Whitcher on the subject indicates that Rice's earlier inquiries had at least the tacit support of his coworkers. In any event, it would defy logic to assume that any of the employees on the job, who had discussed the issue among themselves, were not supportive of someone trying to find out whether they were all entitled to higher pay.

In light of all of the circumstances set forth above, I conclude that Rice's initiation of conversations with management about proper wage for employees on the school site was concerted in nature.

The second question is whether the Respondent knew that such activities were concerted. Again, with regard to Hebb, there can be no dispute. He and other employees initiated a conversation with an admitted supervisor and agent, Whitcher, on the issue of prevailing wage rate. Moreover, this conversation followed Rice's numerous conversations with Whitcher on the subject, as well as Rice's layoff on October 23.

With regard to Rice, he was alone at all times when he raised the subject with Supervisor Whitcher. He stated to Whitcher that others at the school job said it was prevailing wage and asked if it was. Based on his testimony, he did not expressly articulate whether his inquiries were limited to him or encompassed other employees. Since Whitcher was not called as a witness, he could not be questioned about his understanding of the scope of Rice's inquiries.

In this circumstance, I believe it appropriate to use a reasonable person standard, more specifically, to determine whether or not a reasonable person standing in Whitcher's position would have concluded that Rice was acting solely on his own behalf or was representing the interests or wishes of other employees. As the Board stated in *Aroostook County Regional Opthomology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996), wages are a "vital term and condition of employment, probably the most critical element in employment." If the job was prevailing wage, then not only Rice but all other employees would have been entitled to the additional pay rate. The obvious interest the employees had in the matter is demonstrated by Schaeffer's testimony that in mid-August or September, the issue was common knowledge among them.

Therefore, I believe that Whitcher would reasonably have concluded that Rice's inquiries about prevailing wage rate represented collective concern, rather than only his interests as an individual employee. Accordingly, I conclude that the Respondent had knowledge—constructive, if not actual—of the collective nature of both Rice's and Hebb's activities.

The third step of the inquiry is determining whether the activity—pursuing the matter of proper wage with the responsible State agency, the general contractor, and management—was protected activity. It is axiomatic that wages constitute a key term and condition of employment, and the Board has held that discussion of wages constitutes protected concerted activity, because wages, "probably the most critical element in employment" are "the grist on which concerted activity feeds." *Aroostook County Regional Opthomology Center*, supra at 220. Accordingly, this element of the *Meyers* test is satisfied.

The final issue is whether the layoffs of Rice and Hebb were motivated by their engagement in protected activity. For reasons previously stated, I credit Hebb's testimony that Whitcher and Reynolds expressed anger at Rice for, in essence, challenging the amount of pay employees were receiving, and his testimony that Reynolds expressed hostility toward him for his contact with the State regulatory agency representative at the jobsite. I note again that Whitcher was not called as a witness and that Hebb's versions of his statements were not rebutted, and I reiterate that Reynolds was a very unconvincing witness. I also note here that Barnard testified that on October 31, Reynolds made comments to him about not rehiring Hebb because of his "attitude earlier that morning."

I have found that the Respondent had knowledge of the protected concerted activities of Hebb and Rice and demonstrated animus toward them because of such activities. The timing of their layoffs, particularly Hebbs' (the same day he had a conversation with the State agency representative) was highly suspicious. I find, therefore, that the General Counsel has satisfied the first prong of analysis under *Wright Line*, 251 NLRB 1083 (1980), establishing a prima facie case of unlawful layoffs.

The second step under *Wright Line* is to determine whether Rice and Hebb would have been laid off and not rehired despite any considerations related to their protected concerted activities. Put another way, has the Respondent successfully proven its contention that valid economic reasons justified laying them off and not recalling them?

The answer is clearly no. Undisputed evidence reflects that the Respondent was performing other jobs in October and continued them. I credit Barnard's testimony that the day after October 31, he saw Schaeffer and Slone working at the school. However, even fully crediting Reynolds and Schaeffer, the school job, after an hiatus of three or so weeks after October 31, resumed and continued up until only a couple of weeks prior to the hearing on October 8, 2002. Additionally, although Reynolds testified on direct examination that Hebb and Rice were not replaced, he admitted on cross-examination that General Counsel's Exhibit 3 shows that five new employees were hired in 2002, even though Hebb and Rice were never recalled.

Even if the Respondent were able to show valid economic reasons for layoffs in October and for a reduction in the number of employees since then, it could not show that Rice and Hebb would have been selected for layoff but for their protected concerted activities. In neither Reynolds' affidavit to the Board agent nor his testimony did he ever articulate any reasons why he selected them to be laid off, even though I expressly asked him why they were chosen for layoffs while other employees (including at least one with less seniority) were not. Reynolds testified that their layoffs had nothing to do with any problems with their performance. Thus, the record is devoid of any explanation of why the Respondent selected Rice and Hebb for layoff. In the total absence of any proffered justification, it

must be inferred that the sole reason was that they questioned the amount of pay they and other employees were receiving for their work on the school job.

Accordingly, I find that the Respondent violated Section 8(a)(1) of the Act by laying off and not recalling Rice and Hebb because they engaged in the protected concerted activity.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by laying off Gabriel Rice on October 23, 2001, and George Hebb V on October 31, 2001, and thereafter failing and refusing to recall them, because they engaged in protected concerted activities.

3. By the conduct described in paragraph 2, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily laid off employees Rice and Hebb, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER[14]

The Respondent, Reynolds Electric, Inc., Warren, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) From laying off, failing to recall, or otherwise discriminating against any employee for inquiring of a Government agency, general contractor, or the Respondent, whether work being performed by its employees should be paid at the prevailing wage rate, or for otherwise engaging in protected concerted activity.

(b) From, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Gabriel Rice and George Hebb V full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Rice and Hebb whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Warren, Michigan, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 23, 2001.

Dated, Washington, D.C., January 24, 2003.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT lay you off, fail to recall you, or otherwise discriminate against you because you inquire of a Government

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] Corrections to the transcript have been noted and corrected.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

agency, a general contractor, or us about whether you and other employees on a job should be receiving pay at the prevailing wage rate.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Gabriel Rice and George Hebb V full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Rice and Hebb whole for any loss of pay or other benefits suffered as a result of our unfair labor practices.

REYNOLD'S ELECTRIC, INC.